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No. 91-286

In The

Supreme Court of the United States

October Term, 1991

PHILLIP A. BISHOP,

Petitioner,

v.

O. H. DELCHAMPS, JR., ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF DR. HENRY F. SCHAEFER III, DR. GERALD R. BERGMAN, DR. CLINTON H. GRAVES, AND DR. BYRON R. JOHNSON AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment permits a public university to suppress speech by its faculty members presenting a religious viewpoint – while permitting comparable non-religious speech – based solely on the assumption that such religious speech "inherently" bears the university's endorsement and "inherently" pressures students to accept those religious beliefs.

2. Whether the establishment clause requires such suppression without any finding that the state has actually endorsed those religious beliefs or coerced students to accept them.

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37 of this Court, amici curiae Schaefer, Bergman, Graves, and Johnson move for leave to file a brief amici curiae.

1. Parties Consenting and Refusing Consent

Petitioner Phillip Bishop consented to the filing of the appended brief amici curiae and respondents Delchamps, *et al.* refused to consent. Petitioner's letter of consent has been lodged with the Court.

2. Nature of Applicants' Interest

Amici Schaeffer, *et al.* are four professors from across the United States who encountered various forms of opposition and discriminatory discipline at public universities when they engaged in on-campus religious expression similar or identical to that of petitioner. Therefore, they have a very real interest in disclosing to this Court the pervasive and recurring problem of censorship of the classroom expression of public university faculty.

3. Questions Uniquely Addressed By Amici

The appended brief of amici curiae provides the Court with a broader perspective on the national scope of the problem presented in this case. Censorship of faculty expression receives inconsistent treatment among public universities and, thus, the issue requires clarification from this Court.

In addition, while deferring to petitioner's brief on the issue of academic freedom, amici provide this Court with analysis of a) whether the establishment clause of the First Amendment provides a basis for selective suppression of occasional, non-coercive religious comments by a professor in class or in an optional lecture and b) whether the free speech clause of the First Amendment requires the showing of an actual violation of the establishment clause before speech like Dr. Bishop's may be suppressed.

Accordingly, amici's motion should be granted and their appended brief considered by the Court in its deliberation on the petition for certiorari.

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INTRODUCTION

Amici are public university professors who – like petitioner Dr. Phillip Bishop – have experienced harassment or discrimination because they have expressed religious perspectives in the course of teaching their academic subjects. *Amici* wish to apprise the Court that the issues raised in this case are recurring at public universities throughout the country and in a variety of subject areas. *Amici*'s particular experiences are set forth

in detail in the Interest of Amici Curiae immediately following.[1]

INTEREST OF AMICI CURIAE

Dr. Henry F. Schaefer, III, is a chaired professor of chemistry at the University of Georgia and a multiple Nobel Prize nominee. During his first year at Georgia, 1987-88, Dr. Schaefer accepted the invitation of a student religious group to present five or six one-hour lectures on campus concerning science and Christianity. The lectures were strictly optional and unrelated to any course (Dr. Schaefer had no teaching assignments at the time). A dozen or more faculty members complained to administrators about a university employee discussing a religious topic on campus. However, on advice of counsel, university officials took no action against Dr. Schaefer. Instead, they simply requested that any advertisements state that his lectures were not university-sponsored and were not required for any course. Dr. Schaefer complied.

In addition, during the first class meeting of each of his courses, Dr. Schaefer makes a fifteen-second statement disclosing his religious faith and the fact that it frames his analysis of and approach to science. The university has not sought to restrict these statements.

Dr. Gerald R. Bergman, currently a tenured professor at Northwest Technical College in Ohio, was denied tenure in 1979 as a statistics professor at Bowling Green State

[1] Copies of documents detailing the particulars of *amici*'s own experiences are being lodged with the Clerk of the Court.

University. Dr. Bergman has doctorates in statistical research and biology and has published numerous books and articles. Much of his published work involves criticism of Darwinian evolutionary theory. University officials admitted, in pretrial discovery in Dr. Bergman's lawsuit, that their decision to refuse tenure was based in part on the speculation that, given Dr. Bergman's vocal religious beliefs, he must have made improper religious comments in the classroom. (Dr. Bergman denies having made any such in-class remarks.) The U.S. Court of Appeals for the Sixth Circuit, in an unpublished opinion in 1986, upheld the university's action, accepting the legitimacy of the university's other purported reasons for denying tenure. *Bergman v. Bowling Green State University*, No. 86-3031 (6th Cir. June 16, 1987) (per curiam).

Dr. Clinton H. Graves has for almost 40 years been a professor of plant pathology at Mississippi State University. Spurred by a recommendation at a faculty training seminar, Dr. Graves began a practice of introducing himself to his students at the beginning of a semester by asking them to list their personal and educational interests on a note card and then, in turn, himself distributing a one-page biographical sketch summarizing his own education, scholarship, and personal interests. At the bottom of this resume, among his personal interests, Dr. Graves typically stated simply that he was "committed: to the lordship of Jesus Christ." In addition, he made occasional brief, non-proselytizing comments to students in class concerning his religious beliefs and their relation to issues in plant biology.

In 1985, Dr. Graves received a letter from the American Civil Liberties Union of Mississippi demanding that he take steps to "remedy" the "possibility that you are introducing significant religious content into your regular

classroom proceedings." Copies of this letter were sent to the university's president and trustees. Dr. Graves responded in writing that he "did not believe that professors should teach religion in classes not designed for that purpose," but that he was "not required to cease being what I am, a Christian, the moment I walk on campus." The ACLU never pursued the matter, nor did it seek to remedy any intimidation or other damage its letter might have caused Dr. Graves.

Dr. Byron R. Johnson was an assistant professor of criminology at Memphis State University from 1986 through 1991, when his contract was terminated. Beginning in 1987, Dr. Johnson was instrumental in organizing a Christian Faculty/Staff Fellowship at Memphis State. He did not, however, discuss his religious beliefs in class. Although Dr. Johnson published more and received higher teaching evaluations than any other assistant professor in his department, he received substantially smaller salary increases from 1988 through 1990 than other department members, and was eventually terminated. During discussions with Dr. Johnson, university officials told him he "did not fit in" and that "given his philosophical leanings, he should consider teaching at some smaller religious affiliated school." Complaint in *Johnson v. Carpenter et al.*, No. 91-2075, at 4-8 (W.D. Tenn. Jan. 25, 1991). Dr. Johnson has sued the university in federal district court under federal civil rights laws (see *ibid.*), and that lawsuit is now in pretrial discovery.

REASONS FOR GRANTING THE PETITION

Amici strongly endorse the conception of academic freedom set forth in the petition for certiorari. As public

university professors, *amici* too are deeply troubled about the court of appeals' opinion, which reduces the protection of academic freedom in the classroom to the lowest level of judicial scrutiny, rational-basis review. Pet. App. A15. Like petitioner, we strongly believe that American higher education cannot function in anything like its current form under the supposition that in-class speech by professors must be controlled because it inherently "creates the appearance of [university] endorsement" and has a "coercive effect" on students. See Pet. App. A22, A16.

This case involves restrictions on a professor's occasional in-class comments and an optional out-of-class lecture, both presenting his personal views on the subject of his academic expertise. *Amici*'s own experiences, detailed *supra* in the Interest of Amici Curiae, reveal that the problem presented here is recurring on campuses throughout the nation. Although this case and *amici*'s experiences involve religious speech in particular, we are shocked at the breadth of speech rendered vulnerable by the court of appeals' decision.[2] Indeed, the decision sets forth a rationale for approving a university's broad power to censor any comments that might "produce more apprehension than comfort in students." Pet. App. A10. This view is completely antithetical to the premise underlying higher education – that students grow intellectually

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[2] For example, the court expressly analogized the religious speech here to statements by a "sexist instructor" (Pet. App. A10), necessarily implying that a university has virtually unlimited power to prohibit comments that someone might complain of as "sexist."

from confronting new or disturbing ideas, not from avoiding them.

We do wish to draw the Court's attention to the fact that religious speech is particularly susceptible to being singled out for suppression. Petitioner was reprimanded for his expression solely because of the religious viewpoint presented in it; the University routinely permits faculty to present non-religious perspectives in the classroom in their areas of expertise. *Amici*'s experiences show that such discrimination is, unfortunately, typical. Religiously committed academics in public universities across the country face resistance when they attempt, however briefly, to discuss or even disclose their ideological perspective in the course of their teaching or scholarship.

As the experiences of both petitioner and *amicus* Dr. Henry Schaefer show, the mere effort to initiate discussion of the relations between religious beliefs and "secular" academic subjects draws fire from those who deem such talk "inappropriate" for a public university. See *supra* p. 2; Pet. App. A27. Several commentators have also described this culture of resistance to religious thought in institutions of higher education.[3]

Sometimes university administrators respond to complaints as they did here: by restricting the expression or denying advancement to the speaker. In other instances,

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[3] See, *e.g.*, Freeman & Mensch, *The Politics of Virtue: Animals, Theology, and Abortion*, 24 Ga. L. Rev. 923 (1991); McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 L. & Contemp. Probs. 303, 315 (1990); Smolin, *The Judaeo-Christian Tradition and Self-Censorship in Legal Discourse*, 13 U. Dayton L. Rev. 345 (1988).

such as Dr. Schaefer's, university officials have defended faculty members' rights of free speech. But we question whether the administrators and lawyers at the University of Georgia (which, like the University of Alabama, is located in the Eleventh Circuit) would have supported Dr. Schaefer had the court of appeals' holding in this case been on the books at the time.

Amici's experiences undermine the claims of those who would deny academics the right to make mention of their religious perspective in the classroom. Teachers such as petitioner and *amici* do not use their positions to proselytize students. They disclose their religious commitments, briefly and without applying pressure, so as to help students in understanding and evaluating the teacher's classroom presentations. See *supra* pp. 2, 3; Pet. App. A28. Petitioner and *amici* also believe that their religious perspective informs and shapes their scholarship and analysis, and that by entirely suppressing this perspective they would be giving their students an intellectually dishonest presentation. See *supra* pp. 2, 3; Pet. 22.

There are many reasons why discrimination against religious expression occurs. Religious expression can easily raise controversy, which some university administrators wish to avoid at all costs. Some educators hold a stereotype of religious views as intolerant, unenlightened, and altogether unsuitable for a place of intellectual inquiry. See, *e.g.*, M. Perry, MORALITY, POLITICS & LAW 183 (1988) (decrying secular thinkers whose "reductionist attitudes to religious thought" prevent them from "explor[ing] some of the richest resources for thinking about the human"). Thus, for example, petitioner's supervisor denigrated his views as "Bible belt" and therefore

"inappropriate" at the University (Westerfield Dep. at 44); and *amicus* Dr. Byron Johnson was told he "did not fit in" at Memphis State and, "given his philosophical leanings," should instead teach at a "religious" college (*supra* p. 4). Above all, as this case shows, officials proceed on the mistaken assumption that religious discussion must be "kept out of the classroom" entirely, on account of the establishment clause.

These rationales must be soundly rejected. The Constitution does not permit "government to treat religion and those who practice or teach it . . . as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment). What the establishment clause forbids is endorsement of religion by the government – not by individuals who, like petitioner, happen to be government employees. Of course, if a professor pursues his in-class religious speech to such an extent that course coverage suffers, or the classroom is suffused with an evangelistic or liturgical atmosphere, or students are pressured to conform to his beliefs, then the school may and should act. But such restrictions must rest on a substantial showing, based on specific facts, that the *university's* name is being tied to religious indoctrination or that a professor is diverting classroom time to that purpose. See *Widmar v. Vincent*, 454 U.S. 263, 275-276 (1981); *Healy v. James*, 408 U.S. 169, 190-191 (1972); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508-509 (1969).

There was no such showing in this case. The record is undisputed: petitioner's comments were nondisruptive, noncoercive, and clearly identified as his own "personal

bias." The University's actions rested only on its unsupported legal conclusion that any and all religious comments in the classroom violate the establishment clause, and on the bare complaint by a few students that such comments are "inappropriate." The First Amendment does not permit the singling out of religious speech based on such thin foundations. Religious speech is not a luxury to be left to the mercy of transient standards of "political correctness." It is an individual's inalienable right, protected by the First Amendment and unyielding except upon clear proof that the *state* is endorsing or coercing religious belief through the speech.

I. The Occasional In-Class Expressions of a Public University Professor Cannot Be Construed As Bearing the University's Imprimatur, And Thus Are Protected Under the First Amendment When They Are Nondisruptive and Noncoercive.

The decision of the court of appeals in this case constructs a framework authorizing virtually limitless censorship of in-class or classroom-related speech by professors. This Court has recently reaffirmed that the university is a "traditional sphere of free expression" (*Rust v. Sullivan*, 111 S. Ct. 1759, 1776 (1991)); indeed, the Court has long recognized that the college "classroom is peculiarly the 'marketplace' of ideas" (*Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1966)).[4] Yet, as noted in the petition for certiorari, the decision below reduces the academic freedom of university professors to the level of

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[4] Accord *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (quoting *Healy v. James*, 408 U.S. 169, 180 (1972)).

students receiving journalism training in a high school class. Pet. 17 (citing *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

The court's startling conclusion rests on two propositions that are entirely inconsistent with the premises and traditions of American higher education: first, that "a teacher's speech can be taken as directly and deliberately representative of the school" (Pet. App. A13); and second, that "a professor's speech inherently possesses" a "coercive effect upon students" (*id.* at A16). We agree with the arguments set forth in the petition for certiorari that these assumptions are incompatible with any significant guarantee of academic freedom. See Pet. 11-14, 21-24. We add only the following observations.

The proposition that a university endorses everything it does not censor evaporates under even the most minimal scrutiny. The University of Alabama itself offers religion and philosophy courses in subjects as varied as Myth, Ritual and Magic; Native American Religions; and Existentialism and Phenomenology. *Undergraduate Catalog 1988-90: University of Alabama* 327-333 (1988). Obviously neither students nor anyone else believe that the University vouches for everything that teachers say in each of these classes. Numerous decisions of this Court wisely recognize that college and university students are sufficiently mature to disassociate the speech of individuals from the position of the university, and are not readily susceptible to ideological indoctrination. *Widmar, supra*, 454 U.S. at 274 n.14; *Tilton v. Richardson*, 403 U.S. 672, 686 (1971); cf. *Board of Education v. Mergens*, 110 S. Ct. 2356, 2372 (1990) (same factors true even of high school students).

Moreover, the court of appeals' reasoning and result ultimately would place universities themselves under untenable pressure. As President Lowell of Harvard stated in a famous speech during World War I, resisting pressure from alumni to dismiss a pro-German professor:

> If a university or college censors what its professors may say, if it restrains them from uttering something that it does not approve, it thereby assumes responsibility for that which it permits them to say. This is logical and inevitable, but it is a responsibility which an institution of learning would be very unwise in assuming.

Lowell, *A. Lawrence Lowell on Academic Freedom in Wartime*, in 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 879 (R. Hofstader & W. Smith eds. 1961). If universities that decline to censor faculty speech are thereby held to have endorsed it, one can expect constant, severe, and distracting public pressure on school administrators to engage in such censorship in a host of individual cases.

The court of appeals attempted to limit its holding to petitioner's "classroom speech." Pet. App. A18. But its rationale authorizes limitations on many other forms of faculty expression. If a professor's in-class speech can be attributed to the university merely because he is employed there, so can his comments in the media or statements in his scholarly work. Surely, some students taking a professor's classes might feel discomfort or anger at his extracurricular speech or scholarship. Indeed, a federal court recently struck down restrictions placed on a controversial City College of New York professor whose extracurricular statements assertedly had "the potential to harm the process of education in his

classes." See, *e.g.*, Wall St. J., Sept. 5, 1991, at B8, col. 5 (quoting faculty committee's reasons for restrictions).[5]

II. The University's Suppression of Petitioner's Religious Speech Discriminates On the Basis of His Viewpoint Without Justification.

It is undisputed that the University imposed restrictions on petitioner's speech that it does not apply to other speech by its professors. The memorandum sent to petitioner speaks for itself; it is limited only to "the [in-class] interjection of *religious* beliefs and/or preferences" and the presentation in "optional classes" of "a *'Christian* perspective' of an academic topic." Pet. App. A27 (emphases added). On its face, the memorandum singles out religious speech alone for restriction.

Based on "[n]umerous undisputed affidavits," the district court found (and the court of appeals did not question) that "University policy does not prohibit faculty members from engaging in non-religious classroom speech involving personal views on other subjects." Pet. App. A28 (quoted at Pet. App. A6). "Nor is there a University policy prohibiting faculty members from organizing after-class meetings if discussions are not from a religious perspective" (*ibid.*), and other professors commonly participate in such meetings. Pet. App. A33. In short, contrary to the University's actions here, "[t]here is

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[5] The court of appeals' differing treatment of classroom speech conflicts with this Court's repeated statement that it is "[t]he college *classroom* with its surrounding environs" that "is peculiarly 'the marketplace of ideas.' " *Widmar*, 454 U.S. at 267 n.5 (emphasis added) (quoting *Healy*, 408 U.S. at 180).

no University policy attempting to control the statements of faculty members as long as they do their job." Pet. App. A6 (quoting *id.* at A28).

By restricting petitioner's speech solely because of its religious content, the University's actions transgress the most fundamental principles of the First Amendment. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Speech presenting a religious perspective is entitled to the same nondiscriminatory treatment as other forms of speech. *Widmar, supra*, 454 U.S. at 269; *Board of Educ. v. Barnette*, 319 U.S. 624 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Likewise, the central focus of the free exercise clause, under this Court's precedents, is to prevent the state from singling out religious speech and activity for suppression or disabilities. *Employment Division v. Smith*, 110 S. Ct. 1595, 1599 (1990) (state may not ban "acts or abstentions only when they are engaged in for religious reasons, or only because of the religious beliefs they display"); *McDaniel v. Paty*, 435 U.S. 618 (1978).

The court of appeals' conclusion that "a university classroom is [not] an open forum during instructional time" (Pet. App. A8-A9) does not undercut the application of this principle. First, the court of appeals' conclusion was in error. "[A] university campus, at least as to its students, possesses many of the characteristics of a traditional public forum." *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 803 (1985) (citing *Widmar*, 454 U.S. at 267 n.5). Given that the college classroom is "peculiarly" the "marketplace of ideas" (see *supra* pp. 9-10), the

forum must extend to the in-class expression of professors as well. In any event, the University here has created a forum for faculty speech. Just as the university's policy in *Widmar* of allowing access to its facilities "created a forum generally open for use by student groups" (454 U.S. at 267), so the University's clear practice here of allowing professors to engage in occasional personal comments during class and to deliver out-of-class lectures creates an open forum for such expression.

Second, whatever the nature of the forum, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius*, 473 U.S. at 806. Petitioner's speech plainly concerned an "includible subject" – human physiology, the very subject he taught – and the University acted to suppress only a religious viewpoint – the "Christian Perspective" (Pet. App. A27) – on this academic subject.[6]

The court of appeals' reasons for permitting discriminatory suppression of petitioner's religious speech plainly do not amount to the "compelling interest" required by this Court's cases (see *Widmar*, 454 U.S. at 270). Neither the University nor the court of appeals

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[6] In addition, public forum analysis does not apply here. There is no question of petitioner's right of access to the classroom; because he was going about his business of teaching in a place he was entitled to be, he is presumptively entitled to speak under *Tinker*. See *Tinker*, 393 U.S. at 512-513; *Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987) (citing Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 48 (1986)).

identified any colorable pedagogical reason for suppressing petitioner's brief in-class comments or his optional lecture. It is undisputed that petitioner covered the course material fully and that he was a well-regarded and successful teacher. Pet. App. A32.

Instead, the court held that the University had a legitimate interest in preventing "religious bias" from "infecting the teacher or the students," because expression of a religious viewpoint "no matter how carefully presented . . . engenders anxiety in students." Pet. App. A19, A22. But discomfort, anger, or anxiety on the part of a student or two cannot authorize suppression of a viewpoint. For "school officials to justify prohibition of a particular expression of opinion, [the school] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. The First Amendment will not countenance a "heckler's veto":

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling affects as it presses for acceptance of an idea. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas.

Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949); accord *Texas v. Johnson*, 491 U.S. 397, 408-409 (1989). To hold, as the court of appeals did, that a viewpoint may be singled out because it alone "has produced student complaints"

(Pet. App. A10) strikes at the heart of the First Amendment.

III. The University's Concern With Establishment Clause Violations Provides No Basis For Discriminatorily Suppressing the Occasional, Non-Coercive In-Class Religious Comments of a Professor.

As we have just shown, the University had no colorable pedagogical reason for suppressing petitioner's speech. Rather, administrators believed they were under a "legal duty" (P1. Exh. 10, at 3; Roth Dep. at 20, 36) "to avoid an establishment of religion by Dr. Bishop's conduct which connected the University to a particular religious viewpoint." Pet. App. A21. The district court too found that "[t]he University's only justification for exclusion is an effort to avoid an establishment of religion." Pet. App. A32.

The court of appeals did not ultimately decide the establishment clause question. It held that the University could suppress petitioner's speech merely to avoid a "potential establishment conflict." Pet. App. A21. But the court made clear that its analysis was predicated on a finding that in-class religious speech by a professor is *per se* coercive:

> [T]he expression of a religious position in a secular subject, no matter how carefully presented, creates the appearance of endorsement of that position by the University and engenders anxiety in students who may feel compelled to feign a similar belief and, worse still, deny their own beliefs.

Pet. App. A22.

These bald assertions provide no basis for content-based suppression of petitioner's speech. In the first

place, there can be no question but that petitioner's actions did not amount to an actual establishment clause violation – as the district court found. As we have already shown, a reasonable observer would not perceive any government endorsement of, or "imprimatur of state approval on," petitioner's religious views merely because the University permitted him to express such views. *Widmar*, 454 U.S. at 274.[7] To permit petitioner to express his religious perspective on his area of expertise would be merely an "incidental," not the "primary," effect of the University's general policy of permitting professors to engage in nondisruptive personal expression during classroom periods. See *Mergens*, 110 S. Ct. at 2373; *Widmar*, 454 U.S. at 274-275.[8]

Nor is there a shred of record evidence that petitioner used the power of the state to coerce any student into religious activity or profession. The district court specifically found no coercion (Pet. App. A27, A36), and any

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[7] See *Mergens*, *supra*, 110 S. Ct. at 2372 (even at high school level, "[t]he proposition that schools do not endorse everything they fail to censor is not complicated").

[8] Plainly, petitioner's individual endorsement of religion cannot itself be impermissible under the establishment clause. The establishment clause prohibits only governmental endorsement of religion; and religious speech by individuals not only is not illegal, but is a constitutionally protected and inalienable right. A professor's endorsement of religion cannot implicate the establishment clause unless the particular circumstances give rise to an inference of state endorsement – and in a sphere of free expression, such an inference is almost always unwarranted. If public employees are to have any rights of religious speech, the distinction between individual and governmental endorsement of religion must be preserved. The court of appeals' knee-jerk finding of state endorsement undermines the distinction, and this Court should correct that fundamental misstep.

other conclusion would be insupportable. Petitioner explicitly stated to his students that his religious views were his own "bias," which they need not share. Pet. App. A3. Attendance at the "optional class," moreover, was truly optional and had no effect on grades because petitioner used a blind grading system. Pet. App. A27. No student testified that he or she had felt coerced by petitioner's statements.

The absence of any showing of an establishment violation is dispositive. In a "traditional sphere of free expression" such as the university (*Rust, supra*, 111 S. Ct. at 1776), the suppression of a professor's religious speech must be based on a clear finding, supported by record evidence, of an actual establishment violation. Speculation, such as the court of appeals', about "potential" establishment concerns and "inherent" effects (Pet. App. A21, A16) is not enough.

The court of appeals' proposition – that "[t]he University can restrict speech that falls short of an establishment violation" (Pet. A22) – is irreconcilable with *Widmar v. Vincent, supra*. The officials there defended exclusion of a religious group from school facilities open to other groups, based on the asserted interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause." *Id.* at 276. The Court rejected the argument, holding that this interest could not overcome the plaintiffs' rights under the free exercise and free speech clauses. *Id.* at 275-276.

Likewise, while schools may restrict student or teacher speech that "substantially interfere[s] with the work of the school" or "impinge[s] upon the rights of other[s]" (*Tinker, supra*, 393 U.S. at 509), the Court has always required a "specific showing" in the record that

such effects have occurred or likely will occur (*id.* at 511). See *id.* at 508 ("undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"); *Healy*, 408 U.S. at 190-191 (requiring "substantial evidence" of disturbance).

The court of appeals' analysis completely subordinates a professor's free speech and free exercise rights to the most speculative and groundless establishment clause concerns. This "unyielding weighting in favor of [disestablishment] over all other interests" (*Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985)), contravenes the First Amendment.

To be sure, a university has an interest in maintaining its neutrality concerning the views presented in the classroom and in ensuring that a professor does not use his university position to coerce students into adopting his views. When the views in question are religious and the university is public, that policy takes on constitutional significance because of the establishment clause. But merely because the policy is of constitutional status does not mean that mere speculation concerning it, or the slightest risk of violating it, should suffice to overcome free speech and free exercise rights. Several members of this Court have expressed dissatisfaction with the practice of finding establishment clause violations based on conjecture and presumptions rather than on record evidence. See, *e.g.*, *Aguilar v. Felton*, 473 U.S. 402, 427-429 (1985) (O'Connor, J., dissenting, joined by Rehnquist, J.); *Bowen v. Kendrick*, 487 U.S. 589, 624 (1988) (Kennedy, concurring, joined by Scalia, J.).

In sum, there is no "specific showing" in the record that petitioner's comments went beyond expression of his own personal outlook or violated the establishment

clause. Under *Tinker*, *Healy*, and *Widmar*, petitioner's free speech and free exercise rights must prevail over the University's unsupported conjectures about potential state endorsement or coercion.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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